Recent Developments in Environmental Law

Municipalities Regain Control over Trash—"Flow Control" Revived

Michael D. Diederich, Jr.*

SOLID WASTE "FLOW CONTROL"—the power local government has to control the movement of trash—has been revived. After *C & A Carbone, Inc. v. Town of Clarkstown,*[1] many believed municipalities lost this control by interfering with the movement of an "article of commerce." The Second Circuit Court of Appeals, however, has corrected this misinterpretation. In *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.,*[2] the Court held that local government can permissibly direct the flow of waste to *public waste facilities,* without running afoul of the United States Constitution's Commerce Clause. This is a decision of national importance because it gives back to municipalities the power to comprehensively self-manage their own garbage and recyclables in an economically and environmentally sound manner as envisioned by state and local solid waste management plans.

I. *C&A Carbone v. Town of Clarkstown*

To understand *United Haulers,* one must examine what was actually held by the Supreme Court in *Carbone.* In *Carbone,* the U.S. Supreme Court invalidated a town flow control ordinance because the regulation impermissibly discriminated in favor of the town's preferred local vendor in waste management services.[3] The case involved a Town of Clarkstown ordinance that essentially required that all ordinary garbage found within the town, even imported garbage, be delivered to a privately run transfer station for ultimate disposal elsewhere.[4] The town guaranteed this transfer station a minimum volume of waste, and thus an assured profit amortizing the cost of the facility that the town could

*Mr. Diederich's law practice includes environmental law. He submitted an *amicus curiae* brief, and gave oral argument in the *United Haulers* case, which was persuasive to the Court. Mr. Diederich can be reached at 361 Route 210, Stony Point, NY 10980, by telephone (845) 942–0795, or by e-mail at attorney@usc.net.

1. 511 U.S. 383 (1994).
2. 261 F.3d 245 (2d Cir. 2001), *cert. denied,* 534 U.S. 1082 (2002).
3. *Carbone,* 511 U.S. at 394–95.
4. *Id.* at 383.

eventually purchase for one dollar.[5] The town's promise of waste delivery was backed by its flow control ordinance, which, in this case, required that the nonrecycled waste from plaintiff C&A Carbone's recycling facility be brought to the town-designated facility.[6] Thus, plaintiff C&A Carbone's refuse, both locally generated and imported, was effectively co-opted by the town, for the benefit of the town's preferred vendor, a local business.[7] The ordinance forced C&A Carbone to lose control over the local and interstate garbage it was processing by requiring it to bring its nonrecycled refuse to the town's vendor.[8]

The Supreme Court, in a 6–3 decision, found the town's ordinance unconstitutional as protectionist discrimination.[9] The Court viewed the town's flow control ordinance as imposing a "local grab" (local processing) requirement, a type of favoritism historically found to violate the Constitution's Commerce Clause.[10] It is crucial that the Court relied on the "local grab" constitutional analysis, rather than, as petitioner had argued, that the trash itself is a protected "article of commerce."[11] The *Carbone* court avoided this characterization—a characterization which might, without logic, extend constitutional protection to all waste and pollutants (air, water, solid).

This is an important distinction, for many reasons. If solid waste is viewed as a commodity, then what is the propriety of governmental policies seeking its elimination, reduction, recycling, and proper disposal? Are other waste emissions, such as air and water pollutants, also commodities? Moreover, if wastes are commodities, must we adjust international law to protect the "free flow of waste"? If Canada self-manages all of its solid waste locally, is this an act of trade aggression by depriving American or Mexican landfills of its country's trash? Should we favor international "pollution havens" because they most cheaply accommodate the waste byproducts of human activities? It seems apparent that to classify waste as an article of commerce has no principled basis in law or logic and is distinguishable from the situation where, as in *City of Philadelphia v. New Jersey,*[12] the issue was waste

5. *Id.* at 387.
6. *Id.* at 387.
7. *Id.* at 388.
8. *Carbone,* 511 U.S. at 388.
9. *Id.* at 394–95.
10. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6–9 (2d ed. 1988) (discussing "local grab" cases).
11. *Carbone,* 511 U.S. at 393. *See also* Michael D. Diederich, *Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management,* 11 PACE ENVTL L. REV. 157, 198–201, 208–15 (Fall 1993).
12. 437 U.S. 617 (1978).

that had been tendered to the private sector for management and was already moving within the channels of commerce.

Nonetheless, the Supreme Court's invalidation of the town's flow control ordinance in *Carbone* made sense. If every community attempted to grab and tax trash already being managed by the interstate solid waste industry, and already moving in commerce, the interstate solid waste marketplace would be impaired and commercial transactions (not to mention public outsourcing) would be severely disrupted.[13] Local government cannot permissibly "grab" for a local business's profit on commerce that is properly moving in interstate channels. The Court has a tradition for invalidating such parochialism.[14]

On the other hand, the fact that the Supreme Court did not rely on the "waste is commerce" argument, but instead, as discussed above, relied upon traditional "local grab" Commerce Clause jurisprudence, is of immense significance. If the Supreme Court had not employed its traditional, narrow, local grab analysis as in *Carbone,* but instead used a "waste is commerce" rationale, this could have defeated state and local governments in subsequent Commerce Clause challenges by giving constitutional status to discarded material.

II. Post-*Carbone* Cases

As cases unfolded in the appellate courts, public systems that did not discriminate in favor of locally preferred business survived judicial scrutiny. Appellate courts found ways to allow the public to manage its trash, such as where "open and competitive" procurement was employed (so as not to discriminate against out-of-state firms),[15] or where the "market participant exception" to the Commerce Clause was used to contract for services.[16]

On the other hand, where a state drew preferential waste management lines at its border, the Third Circuit regarded this as discrimination in violation of the Commerce Clause.[17]

13. *Cf.* Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93 (1994) (Oregon's surcharge on waste entering the state violated the Commerce Clause).

14. *See* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

15. *See, e.g.,* Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178 (1st Cir. 1999); Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3d Cir. 1995).

16. *See* SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995); USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995).

17. *See* Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 48 F.3d 701 (3d Cir. 1995).

III. Permissibility of Public Self-Management of Local Trash

Of course, there has always remained the ultimate means for local government to take control over local trash—public collection. Yet none of the above cases addressed whether a local community has the fundamental democratic right to publicly self-manage its own trash through other, non-DPW means.

In Congress, unattractive legislative solutions were proposed. The "solutions" proposed would permit some existing flow control, but would eventually eliminate local control forever, bequeathing waste to the private sector. Contemporaneously, "waste transport" legislation was proposed, which would, ironically, impede the flow of waste legitimately placed into commerce by municipalities needing to export trash. These proposed congressional "solutions" were contrary to the spirit and intent of the Commerce Clause, and both approaches promote waste management "balkanization."

Thus, through these post-*Carbone* years, there remained no answer to the fundamental question of whether the public could democratically self-manage its own garbage. This question was finally answered, thoughtfully and positively, in the Second Circuit's *United Haulers* decision.

IV. Importance of *United Haulers* Case

In *United Haulers,* the Second Circuit accepted the arguments of the *amicus* New York State Association of Solid Waste Management in holding that flow control to a public entity is not impermissible discrimination under the Commerce Clause.[18] The court saw the debate between the Justices in *Carbone* regarding whether or not the preferred local vendor was "quasi-public" or "private" as an indication that this was a distinction of constitutional dimension.[19] The Second Circuit did not stop there, but rather went on to explain how the Supreme Court's local grab analysis led to the inescapable conclusion that government preferring its own *public* facilities does not constitute discrimination against interstate commerce because it is not discrimination in favor of local business.[20]

Also worth considering is whether, if the public were not permitted to self-manage the traditionally local function of waste management (a form of sanitation), one might ask whether other traditional activities

18. 261 F.3d 245 (2d Cir. 2001).
19. *Id.* at 259.
20. *Id.* at 263.

of local government—police or fire protection—might be subject to Commerce Clause challenge by a potential private service provider.

While the Second Circuit felt constrained, as a matter of legal formality based upon the procedural posture of the case, to remand *United Haulers* to the district court, it appears that victory for the public's waste management system is virtually assured. The district court must undertake a "Pike balancing test," to determine whether the comprehensive waste management system of Oneida and Herkimer counties creates an undue burden on interstate commerce.[21] However, "Pike balancing" generally means municipalities win, and here the Second Circuit made expressly clear its view that the traditional power of local government to manage its own citizen's waste must be considered.[22]

The challenge now is to overcome many years of indoctrination that "flow control is unconstitutional." Public waste officials should become familiar with *United Haulers,* and rethink this issue. After *United Haulers,* public self-management of trash need not be seen as perilous. Rather, especially when combined with fair, open, competitive, and geographically nondiscriminatory out-sourcing of service providers, municipal flow control can be a viable means of managing the public's trash.

V. Concluding Thoughts

Local democratic rule over waste should not be a revolutionary idea. Local government can manage crime, fire, and education without Commerce Clause scrutiny. Garbage, a form of pollution, should be viewed no differently. It is a traditional local activity for purposes of the Tenth Amendment and of federalism. Moreover, Congress has stated its policy regarding garbage management in Subtitle D of the Resource Conservation and Recovery Act (RCRA), where it expressly states, "the collection and disposal of solid wastes should continue to be primarily the function of state, regional and local agencies."[23]

United Haulers[24] is a crucial precedent of national, and perhaps international, importance. Depriving local government of the ability to control its own citizens' wastes could have had far-reaching consequences. If garbage were held to be a protected "article of commerce" even before its movement into the interstate waste stream, then local

21. *Id.*
22. *Id.* at 264.
23. RCRA § 1002(a)(4); *See* 42 U.S.C. § 6901(a)(4).
24. 261 F.3d 245 (2d Cir. 2001).

government would have lost a means to control sanitation. Localities would be forced to rely on free market economics, which can result in garbage flowing to "pollution havens"—the cheapest available waste repositories (where long-term costs and environmental consequences are not considered). The profitable segments of the waste disposal and recycling business would flow to the waste industry, while the less profitable segments (the wastes posing the greatest public health dangers) would be left for municipalities to manage at taxpayer expense.

By permitting local government to self-manage its own citizens' trash, and by allowing solid waste to be directed to public facilities, the Second Circuit in *United Haulers*[25] has created a sound precedent for municipal solid waste management, fully consistent with the dictates of federal environmental law and the Constitution. In the New York State legislature there was a proposal, drafted by the author, to allow municipalities to "take title" to their own trash, to allow proper trash self-management. Basically, the concept was that the people own their own trash and can collectively allow their own government to manage it (notwithstanding the desires of outside waste vendors).

25. *Id.*